(5)

No. 89-1883

Supreme Court, U.S.
FILED
SEP 7 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
FREDERICK G. GIRARD*
JANET K. GOLDSMITH
770 "L" Street, Suite 1200
Sacramento, California 95814
(916) 444-8920
Attorneys for Truckee-Carson Irrigation District

WOODBURN, WEDGE AND JEPPSON
GORDON H. DEPAOLI
One East First Street, Suite 1600
Reno, Nevada 89505
(702) 329-6131
Attorneys for David L. Matley and Christine L. Matley Family Trust, et al.

* *Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

TABLE OF CONTENTS

	Page
Preface	1
1. Introduction	1
2. The Proceedings Below	1
Argument	3
1. Review Is Warranted Here To Define The Relationship Between The Federalism Requirements Of Section 8 And The General Administrative Discretion Of Section 10 Of The Reclamation Act	3
2. Because Resolution Of The Remaining Issues Concerning Classification Of Project Land Depend Upon The Validity Of The Court Of Appeals Decision, That Decision Is Ripe For Review	7
3. The Court Of Appeals' Decision Allows DOI To Interfere With The Reserved Jurisdiction Of The Alpine Court To Interpret, Enforce, And Apply Its Decree	8
Conclusion	9

TABLE OF AUTHORITIES CITED

Cases

	Page
American Constr. Co. v. Jacksonville Tampa & Key West Ry. Co., 148 U.S. 372, 384-85 (1893)	7
California v. United States, 438 U.S. 645 (1978)	3
McDonald v. Thompson, 305 U.S. 263, 266 (1938)	3
Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F.Supp. 252 (D.D.C. 1973)	3
Sekaquaptewa v. MacDonald, 575 F.2d 239, 242-43 (9th Cir. 1978)	7
TCID v. Secretary of Dep't of Interior, 742 F.2d 527 (9th Cir. 1984)	3
United States v. Alpine Land & Reservoir Co., 697 F.2d 851, 852 (9th Cir. 1983)	5
Weinberger v. Hynson, Westcott & Dunning, 412 U.S. 609, 633 (1973)	3

Statutes and Regulations

5 U.S.C. § 702	2
28 U.S.C. § 1331	2
28 U.S.C. § 1361	2
Section 8, Reclamation Act of 1902, 43 U.S.C. § 373	1, 3-5, 7, 9
Section 10, Reclamation Act of 1902, 43 U.S.C. § 372, § 383	1-4, 9
Nev.Rev.Stat. §§ 533.090 et. seq	5

No. 89-1883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TRUCKEE-CARSON IRRIGATION DISTRICT, et al.,
Petitioners,

VS.

UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

REPLY TO BRIEFS IN OPPOSITION

PREFACE

1. Introduction

Neither the United States nor the Tribe pretends that the relationship between Sections 8 and 10 of the Reclamation Act has been clearly defined by this or any other court. The United States acknowledges that it has not. *See* United States Brief at 16. Neither contends that the issue is not one of critical importance to the administration of the Reclamation Act or that it is not worthy of the attention of this Court. Their reasons for not granting review do not withstand scrutiny. In order to properly consider this matter, it is useful to clarify the nature of the proceeding below.

2. The Proceedings Below.

Although this matter first arose in the context of the judicial review proceeding known as the OCAP Litigation, that court and the parties saw the folly of a proceeding for judicial review to be

followed by proceedings before the decree courts.[1] The intent of the district court and the parties was to resolve the controversy pursuant to the district court's continuing jurisdiction to interpret the decrees. The district court not only ordered TCID to file a petition for declaratory relief in a proceeding "separate" from the OCAP Litigation, it ordered that the filing be before the *Alpine* court.

In keeping with the liberal rules of pleading, TCID alleged the jurisdiction of the court was based upon "28 U.S.C. §§ 1331 and 1361 and 5 U.S.C. § 702 and the continuing jurisdiction provisions of the final decrees in . . . *Alpine* and . . . *Orr Ditch*" (App. A-53). The district court concluded that its jurisdiction was grounded upon all bases alleged by TCID, including its continuing jurisdiction under the decrees (App. A-83). The district court phrased its holding in the Final Order as an interpretation of the court's intent at the time the final decree in the *Alpine* case was entered (App. A-111).

In its Final Order, the district court stated that the proceedings below were before the *Alpine* court to determine a starting point for identifying bench lands and bottom lands under the decrees (App. A-111). Exercising its continuing jurisdiction, the *Alpine* court held that TCID's classification as modified by the court would be that starting point and confirmed the procedure to be followed for farm unit adjustments to that project-wide classification (App. A-111). Thus, the proceedings below were in the *Alpine* case, before the *Alpine* judge, to allow the *Alpine* court to establish an initial classification, consistent with the *Alpine* decree.

It is in that context that the court of appeals stated the issue was whether "DOI or the district court bears the primary responsibility for formulating these initial classifications" (App. A-118-119). The court in effect held that Section 10 of the Reclamation Act granted the authority to DOI to establish the "methodology" to distinguish between the two kinds of lands, that the decree

---

[1] The regulation itself recognized that judicial review would be a waste of time because it directed that any dispute to the land classification be instituted before the *Alpine* and *Orr Ditch* courts (App. A-60).

courts could not review that methodology de novo, and that if the decree courts overturn the methodology, they must remand the issue to DOI (App. A-123-127).

ARGUMENT

1. Review Is Warranted Here To Define The Relationship Between The Federalism Requirements Of Section 8 And The General Administrative Discretion Of Section 10 Of The Reclamation Act

a. The United States and the Tribe argue that the "proceed in conformity" with state law directive of Section 8 is its key provision. Their interpretation renders meaningless the requirement in Section 8 that nothing in the Reclamation Act "in any way interfere with the laws of any State or territory relating to the control, appropriation, use, or distribution of water used in irrigation." Elementary principles of statutory construction do not allow such a reading of Section 8. *See, e.g., Weinberger v. Hynson, Westcott & Dunning,* 412 U.S. 609, 633 (1973); *McDonald v. Thompson,* 305 U.S. 263, 266 (1938). Moreover, the history of the Act as recited by this Court in *California v. United States,* 438 U.S. 645 (1978) establishes that proceeding in conformity with state law requires compliance with both the form and substance of that law. Instead of showing that this case involves no serious question of federal law requiring resolution by this Court, the Briefs in Opposition establish that it does.

b. Prior cases involving the rulemaking authority of DOI with respect to the Newlands Project are not controlling. The parties did not litigate, and the courts did not decide the scope of DOI's authority under Section 10 of the Reclamation Act or the relationship between Sections 8 and 10 of that Act in *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F.Supp. 252 (D.D.C. 1973) or in *TCID v. Secretary of Dep't of Interior,* 742 F.2d 527 (9th Cir. 1984).[2] While both cases involve regulations promul-

---

[2] It should be noted that neither TCID nor any owner of Newlands Project water rights was a party to *Morton* and no owner of Project water rights was a party to *TCID v. Secretary*.

gated by DOI, those regulations did not directly interfere with Nevada water law as do the regulations in this case, and did not purport to establish criteria for distinguishing between Project bench and bottom land.

c. The Tribe and the United States argue that review is not warranted because DOI's rulemaking authority can be upheld here without regard to Section 10 of the Reclamation Act. Tribe's Brief at 7-11; United States Brief at 13. They rely on the *Orr Ditch* decree and the 1926 Contract between TCID and the Secretary.

These same arguments were made to the court of appeals and were disregarded by it. The court of appeals grounded its decision solely and exclusively on the relationship between Sections 8 and 10 of the Reclamation Act. Thus, this case presents an opportunity for deciding the scope of the Secretary's authority under Section 10, as limited by Section 8.

Moreover, the contentions of the Tribe and the United States are without merit. The "control and disposal" provision in the *Orr Ditch* decree does not give DOI the authority to adopt and apply its own criteria for bench and bottom lands.[3] The relevant part of that provision *limits* the amount of water allowed or used to 3.5 acre feet per acre for bottom land and 4.5 acre feet per acre for bench lands. That court imposed limit would be rendered meaningless if the language which precedes it allows DOI to define and identify which lands are bench and which are bottom.[4] It is also important that there is no similar provision in the *Alpine* decree.

---

[3] It is important to note that when the "control and disposal" provision was first written in the 1926 *Orr Ditch* Temporary Restraining Order, the Newlands Project was not fully developed. Thus, since the water right granted by the court allowed for the eventual diversion of water not then being beneficially used, that water was subject to the "control and disposal" of the United States.

[4] To allow DOI to define and identify which lands are bench and which are bottom enables one of the parties to this litigation, rather than the court, to make the essential factual determination of the central issue in this equitable proceeding.

The *Orr Ditch* decree clearly could not grant DOI authority to interpret and apply the *Alpine* decree.

Similarly, the 1926 contract between TCID and the Secretary does not authorize the Secretary to adopt and apply criteria for identifying the Project's bench and bottom lands. Article 7 of the 1926 Contract requires TCID to deliver water in full compliance with the court decrees and with the rules and regulations of the Secretary. Certainly, neither that Article, nor Article 34, authorizes the Secretary to adopt a regulation usurping the authority of the decree courts to determine which lands are bench lands and which are bottom lands. Moreover, DOI cannot by contract expand its authority beyond what is allowed under Section 8 of the Reclamation Act. *See, United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851, 852 (9th Cir. 1983).

d. Section 8 of the Reclamation Act requires DOI to proceed in conformity with state law, even if that state law is to be implemented through a judicial proceeding. The fact that no Nevada state agency has classified Project lands for purposes of determining water duty does not mean that DOI can.

Nevada state law establishes a comprehensive system for the adjudication of vested water rights. *See,* Nev.Rev.Stat. §§ 533.090 *et. seq.* Two methods of adjudication are prescribed. The first involves an administrative determination by the State Engineer, subject to judicial review. The second, and the one utilized in this case, involves an initial judicial determination, as more specifically described at page 12 of the Petition. Under this second method, the state accepts the judicial determination, and the statutes provide for continued administration of the rights so determined in accordance with the court's decree.

The *Orr* and *Alpine* decrees are somewhat unusual. They establish a specific water right for certain parties to the litigation, expressed in acre feet per acre or cubic feet per second. However, for the water rights of the individual landowners in the Newlands Project, only a formula for the maximum amount to be delivered to each parcel of land is prescribed—i.e., 3.5 acre feet per acre for bottom land and 4.5 acre feet per acre for bench land. The decrees do not attempt to classify individual parcels as either

bottom or bench. As a result, the actual quantity of water to which each water right holder is entitled depends upon a factual determination of the classification of each parcel of land as either bottom or bench. Thus, the single most important issue involved in the litigation—water right quantity—was, for the Newlands Project landowners, left subject to judicial determination if the quantity of water being delivered to a particular parcel of land was challenged.[5] The court in each case retained jurisdiction and appointed a water master to assist the court in future implementation, administration and enforcement of the decrees.

Under the regime so established, any person aggrieved by any existing or future classification of land as bottom or bench had recourse to the court for resolution of the grievance. This could be through a direct petition to the court or through proceedings before the water master, subject to *de novo* review by the court. This procedure was, in all respects, in conformity with Nevada water law.

Rather than following this procedure, however, DOI in this case attempted to circumvent both the court decrees and the Nevada statutes by purporting to *administratively* reclassify all land within the Newlands Project through the DOI's asserted rulemaking authority, and then to argue, as Respondents continue to argue, that the reclassification is subject only to limited judicial review under the arbitrary and capricious standard. This procedure, erroneously approved by the Ninth Circuit, is clearly contrary to Nevada state law.

While the state statutes recognize judicial determinations of water rights and the continuing jurisdiction of the court entering a decree adjudicating such rights, nowhere does Nevada law au-

---

[5] While no formal process was undertaken to classify bottom and bench lands prior to that included by DOI in its 1985 proposed Operating Criteria and Procedures, there had been a de facto classification from the outset, reflected in the actual amounts of water annually allocated to the various parcels within the Project over the years. These allocations, and the underlying classifications, were clearly depicted on the TCID maps maintained in its offices and introduced in evidence at trial.

thorize or recognize a delegation of this judicial power to an administrative agency or department of the federal government, subject only to limited review by the court which originally entered the decree. Thus, the procedure here followed by DOI and sanctioned by the court below, being contrary to state law, is directly violative of Section 8 of the Reclamation Act of 1902.

As the United States and the Tribe well know, the court of appeals did not decide whether the substance of the DOI criteria violate Nevada law. However, it is clear that they do. The *Alpine* court established water duties on the Carson River based upon Nevada law. Not once, but three times, the *Alpine* court has found the DOI criteria inconsistent with the *Alpine* decree and thus by implication with the substance of Nevada law (App. A-73-A-75; A-82; A-90; A-92; A-114).

2. Because Resolution Of The Remaining Issues Concerning Classification Of Project Land Depend Upon The Validity Of The Court Of Appeals Decision, That Decision Is Ripe For Review

Admittedly, the validity of the criteria may still be challenged on remand. However, the court of appeals has established both the legal standard for that challenge and the procedure for establishing different criteria if the DOI criteria are found to be invalid. It has finally decided that DOI has authority to promulgate regulations designating criteria for distinguishing between bench and bottom land, and that the decree courts must review DOI's decision under the arbitrary and capricious standard. That decision is not one which will be rendered unimportant by the remand. In analogous circumstances where finality is an issue, courts have found orders appealable when the resolution of all remaining issues depended upon or assumed the validity of the order being appealed. *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 242-43 (9th Cir. 1978). That is the case here.

This Court has recognized that in order to avoid extraordinary inconvenience, it is appropriate to review an order or decision even though it may not be the last order which will be issued in a particular case. *See, American Constr. Co. v. Jacksonville Tampa & Key West Ry. Co.*, 148 U.S. 372, 384-85 (1893). The resources

of the judiciary and of the parties may be wasted if review is withheld until the validity of DOI's criteria for distinguishing between bench and bottom land is finally determined. That will involve one, if not more, proceedings before the district court and perhaps before the court of appeals. Those proceedings will be unnecessary if review is granted now and the trial court's decision is reinstated.

The fact that adjustments are permitted for individual farm units in proceedings before the water master does not justify deferring review. Although individual farmers may seek reclassification of their farms before the water master, the criteria which govern that reclassification are not subject to challenge in that proceeding. It is the criteria which create the principal dispute among the parties. Thus, those subsequent proceedings will be of no consequence on the central issue in this case.

3. The Court Of Appeals' Decision Allows DOI To Interfere With The Reserved Jurisdiction Of The Alpine Court To Interpret, Enforce, And Apply Its Decree

The United States' position that the jurisdiction of the decree courts is unaffected by the court of appeals' decision is difficult to understand. On the one hand, the United States contends that its regulations "were issued in implementation of, not in derogation of, the *Orr Ditch* and *Alpine* decrees" (United States Brief at 15) and on the other, it contends that the court of appeals correctly decided that the decree courts must defer to DOI's determination. It wholly ignores the fact that three times the *Alpine* court has found DOI's classification inconsistent with the *Alpine* decree. Without question, the decision of the court of appeals allows DOI to interfere with the continuing jurisdiction of the decree courts.

The Tribe's arguments are equally incredible. First, it asserts the *Orr Ditch* decree allows DOI to classify Project lands as bench or bottom. As has been established above at pp. 4-5, that simply is not true. In addition, that argument conveniently overlooks the *Alpine* decree and its application here. Second, and more incredibly, the Tribe argues that neither TCID in its petition nor the trial court in its decision invoked the *Alpine*

court's continuing jurisdiction. A cursory look at TCID's petition and the trial court's September 11, 1986 Findings and Conclusions establish that both relied upon that jurisdiction (App. A-53; A-83).

CONCLUSION

In essence, Respondents' argument amounts to simply this: In adopting Section 8 of the Reclamation Act of 1902, Congress specifically prohibited any construction of the Act which would "affect or in any way interfere with the laws of any State relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder." Then, in a fit of absent mindedness—or, worse yet, duplicity—Congress added Section 10 to the Act, granting to the Secretary of the Interior the power, through regulation, not only to interfere with but to abrogate totally the laws of the states with respect to the most important aspect of state water law—the determination of the quantity of water which each water right holder is entitled to receive.

Nothing in the Act compels, or even tends towards, any such conclusion. To the contrary, any rational interpretation of the two sections leads to the conclusion that Congress granted authority to the Secretary in Section 10 to enact reasonable regulations for the purpose of implementing the provisions of the Act, so long as such regulations do not, directly or indirectly, violate the specific prohibitions of Section 8. There is not, nor could there be, any provision in the 1926 Temporary Restraining Order, the Agreement between the United States and TCID or the final decrees in *Orr* or *Alpine*, which is contrary to such an interpretation of these two sections of the Reclamation Act.

In this case, the Secretary, purporting to act under the authority of Section 10, adopted regulations which directly interfere with the laws of the state of Nevada, and this interference goes to the very heart of state water rights law. Such interference is directly contrary to the prohibition of Section 8. Petitioners respectfully submit that the perceived conflict between these two sections, which constitutes the basis for the Ninth Circuit's decision, is

squarely and unequivocally presented in this case for final resolution by the Court, and that such a resolution is essential to the continued, successful operation and administration of the Reclamation Act throughout the western United States.

Accordingly, the Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 6th day of September, 1990.

KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Professional Corporation
FREDERICK G. GIRARD
JANET K. GOLDSMITH
770 "L" Street, Suite 1200
Sacramento, California 95814
(916) 444-8920
Attorneys for Truckee-Carson Irrigation District

WOODBURN, WEDGE AND JEPPSON
GORDON H. DEPAOLI
One East First Street, Suite 1600
Reno, Nevada 89505
(702) 329-6131
Attorneys for David L. Matley and Christine L. Matley Family Trust, et al.